BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION

BRENDA D. STACER Claimant	)	
VS.	)	Docket No. 1,022,827
U.S.D. 500 Self-Insured Respondent	)	

ORDER

Claimant requests review of the June 16, 2005 preliminary hearing Order entered by Administrative Law Judge (ALJ) Kenneth J. Hursh.

ISSUES

The ALJ found that there was substantial evidence that all of claimant's symptoms existed before April 8, 2005, from other causes; that she failed to prove that she suffered a new injury arising out of and in the course of her employment with respondent; and, therefore, the ALJ denied claimant's request for benefits.

The claimant requests review of whether the ALJ erred in failing to conclude that she sustained an injury or aggravation from her work, in failing to award medical treatment, and in failing to award temporary total disability compensation.

Claimant contends that she is entitled to compensation from her accident regardless of whether it is the sole cause of her problems or if her work-related activities caused a worsening of her preexisting physical condition. Claimant argues she has met her burden of proof in this regard. Accordingly, claimant requests that the ALJ's order be reversed.

Respondent argues that the opinion of Dr. Temesgen Wakwaya that claimant's condition and complaints do not relate to a work accident on April 8, 2005, is the most credible. Respondent also contends that claimant did not prove that she is entitled to preliminary benefits, and therefore the Board should affirm the ALJ's Order.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Having reviewed the whole evidentiary record filed herein, the Board makes the following findings of fact and conclusions of law:

Claimant has been a school bus driver for respondent for 20 years. The bus she drives is 40 feet long and seats 63 passengers. Claimant indicates that she works all year, not just during the school year of August to June. During the school year, claimant works 52 to 60 hours per week, and in the summer she works around 35 hours per week. Before April 2005, claimant had suffered various types of injuries while working for the school district. Some of those injuries were to her spine. Claimant indicated that beginning in January 2005 and up to April 2005, she was having trouble opening and shutting her bus door, as well as cleaning the bus, which is a requirement. She indicated that it was all that she could do to drive the bus. She also indicated that her ability to operate the bus depended on which bus she was driving at the time.

On the morning of April 8, 2005, claimant was driving her bus in the parking lot of Little Darlings Day Care when she twisted to turn the bus around and in the process felt pain in her low back and upper left shoulder and developed a severe headache. Claimant also attributed her pain to the jarring to her spine from driving through potholes in the parking lot. Claimant called her supervisor and told her that she could not perform her extra duties that day because of a severe headache, and on April 13, 2005, claimant filled out an accident report. Claimant was then referred to Concentra Medical Centers, where her left shoulder was x-rayed and she was sent to physical therapy. At that time, her neck and back were not examined. She was given a lifting restriction of 20 pounds and was told she could not operate a bus. Claimant informed her supervisor of her restrictions and was told that they did not have any light duty work to accommodate her. Claimant has not worked since April 8, 2005.

Claimant saw Dr. Wakwaya on April 19, 2005, who opined that claimant's injury was not due to her job and released her to return to work, but instructed her not to drive a bus and to limit the use of her right arm. Claimant saw Dr. Wakwaya again on April 25, 2005, at which time her chief complaint was shoulder pain. The doctor diagnosed cervicalgia, shoulder strain, and thoracic strain, prescribed medication for the pain and discontinued claimant's physical therapy. He restricted claimant's use of her right and left arms and told her not to do any repetitive lifting over 20 pounds. Claimant saw Dr. Wakwaya again on May 2, 2005, at which time claimant was complaining of shoulder pain. She was diagnosed with cervicalgia and back pain, given medication for pain, restricted to no bus driving, and released to the care of her personal physician.

Claimant saw Dr. Theodore Sandow, Jr., on May 31, 2005. At that time, she described her pain level as a 9 out of 10. Claimant indicated that painkillers do very little for her and that she can only lift light objects. She has the ability to walk no more than a mile before her pain increases and can sit for no more than a half hour. Claimant also told

the doctor that she has had these types of problems before with a previous workers compensation injury. Upon examination, Dr. Sandow diagnosed claimant with spondylolisthesis, degenerative joint and disk disease at C4-5, C5-6 and C6-7, cervical musculoligamentous strain with possible radiculopathy, lumbar musculoligamentous strain with possible radiculopathy and polyneuropathy. He opined that the cause or contributing factor of her condition was an occupational injury on April 8, 2005.[1]

Dr. Sandow felt that claimant had not yet reached MMI, so he did not issue an impairment rating. He did feel that claimant should have an MRI of her cervical and lumbar spine areas to look for spinal stenosis and also that she should have EMG testing to evaluate her upper and lower extremities.

Claimant has had prior work-related injuries but has always before been returned to her duties as a bus driver with respondent without restrictions. Claimant testified that she is not now able to work because of the problems she is having with her legs and her back. At the preliminary hearing, claimant also testified that she had no feeling in her arms and hands.

The Workers Compensation Act places the burden of proof upon claimant to establish her right to an award of compensation and to prove the conditions on which that right depends.[2] "'Burden of proof' means the burden of a party to persuade the trier of facts by a preponderance of the credible evidence that such party's position on an issue is more probably true than not true on the basis of the whole record."[3]

An injury arises out of employment if it arises out of the nature, conditions, obligations and incidents of the employment.[4] Whether an accident arises out of and in the course of the worker's employment depends upon the facts peculiar to the particular case.[5]

Claimant has a history of neck, back, shoulder and upper extremity problems, as well as headaches, that pre-date the accident alleged in this case. Nevertheless, it is well

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[1] P.H. Trans., Cl. Ex. 1 at 5-6.

[2] K.S.A. 44-501(a); *see also Chandler v. Central Oil Corp.,* 253 Kan. 50, 53, 853 P.2d 649 (1993); *Box v. Cessna Aircraft Co.*, 236 Kan. 237, 240, 689 P.2d 871 (1984).

[3] K.S.A. 2004 Supp. 44-508(g); *see also In re Estate of Robinson*, 236 Kan. 431, 439, 690 P.2d 1383 (1984).

[4] *Brobst v. Brighton Place North*, 24 Kan. App. 2d 766, 771, 955 P.2d 1315 (1997).

[5] *Springston v. IML Freight, Inc.*, 10 Kan. App. 2d 501, 502, 704 P.2d 394, *rev. denied* 238 Kan. 878 (1985).

settled in this state that an accidental injury is compensable even where the accident only serves to aggravate or accelerate an existing disease or intensifies the affliction.[6] "The test is not whether the job-related activity or injury caused the condition but whether the job-related activity or injury aggravated or accelerated the condition."[7] No standard of health is prescribed by the Act, and the worker is taken in his or her condition at the time of the alleged accident.[8]

Based on the record presented to date, the Board finds that claimant suffered a work-related accident on April 8, 2005, as alleged, which caused her injuries, including an aggravation of her preexisting spine problems. Accordingly, respondent should provide claimant with medical treatment through an authorized treating physician.

As provided by the Act, preliminary hearing findings are not binding but subject to modification upon a full hearing on the claim.[9]

WHEREFORE, it is the finding, decision and order of the Board that the Order of Administrative Law Judge Kenneth J. Hursh dated June 16, 2005, is reversed. Respondent is ordered to provide claimant with a list of three physicians from which claimant shall select one to be her authorized treating physician. This matter is remanded to Judge Hursh for further orders consistent herewith regarding the payment of temporary total disability compensation and past medical treatment expenses.

IT IS SO ORDERED.

Dated this _____ day of August 2005.

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BOARD MEMBER

c: Dennis L. Horner, Attorney for Claimant
Frederick J. Greenbaum, Attorney for Self-Insured Respondent

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[6] *Demars v. Rickel Manufacturing Corporation*, 223 Kan. 374, 377, 573 P.2d 1036 (1978); *Chinn v. Gay & Taylor, Inc.*, 219 Kan. 196, 202, 547 P.2d 751 (1976); *Harris v. Cessna Aircraft Co.*, 9 Kan. App. 2d 334, 336, 678 P.2d 178 (1984).

[7] *Hanson v. Logan U.S.D. 326*, 28 Kan. App. 2d 92, Syl. ¶ 3, 11 P.3d 1184 (2000), *rev. denied* 270 Kan. 898 (2001).

[8] *Strasser v. Jones*, 186 Kan. 507, 350 P.2d 779 (1960).

[9] K.S.A. 44-534a(a)(2).

Kenneth J. Hursh, Administrative Law Judge
Paula S. Greathouse, Workers Compensation Director